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In The

Supreme Court of the United States

October Term, 1997

EL AL ISRAEL AIRLINES, LTD.,

Petitioner,

vs.

TSUI YUAN TSENG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

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RESPONDENT'S COUNTER-STATEMENT OF THE NATURE OF THE CASE

Respondent, a New York citizen, was a clinical nutritionist employed at a medical center for 22 years (A50-2)*. Looking to vacation in Israel (A52-3), she had booked passage on the May 22nd, 1993, EL AL flight 008, New York to Tel Aviv, departing JFK International Airport in New York City, where petitioner maintained and operated terminal facilities for passengers. (JA19-20)**

Respondent appeared at petitioner's JFK Terminal on the scheduled date for her vacation flight. She presented her ticket and American passport, was interviewed and escorted into a small room by a uniformed male EL AL employee. She was confined in the room for more than an hour before being released and allowed to board the plane. (JA19-20)(A54-58,63).

Imprisonment was conceded. EL AL's Proposed Finding #3 (JA 23): [1]

> Plaintiff was not free to leave the area where she was interviewed unless she declined to board EL AL flight 008.

She was never given the option. The reason for detaining respondent was never explained unless it was to add to pressure on her to submit to what was to follow.

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* "A" references are to Court of Appeals Joint Appendix. This material has been lodged with the Clerk of the Court.

** "JA" references are to Supreme Court Joint Appendix.

1. The very assertion by defendant of the Proposed Finding constitutes an admission by that party proposing it. *United States v. Bedford Associates*, 713 F.2d 895, 905 (2d Cir. 1983). It can be used only against, not for, the defendant. *Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 633 (2d Cir. 1994).

Confined in the small room and unable to leave, what did follow was that Ms. Tseng was compelled to lower her blue jeans to mid-hip level and expose herself to search by a uniformed female EL AL employee. All parts of her body, from head to toe including her most intimate "private parts" were subjected to hands-on palpation for ten to fifteen minutes. Traumatized and humiliated, petitioner was left feeling raped. (A59-62, 86-87). She had not been given the choice to consent or not consent to the search, to forego it, abandon the flight and freely leave the terminal and go home, her body untouched.[2] She should have been. *See People v. Kuhn*, 33 N.Y. 2d 203, 210, 351 N.Y.S. 2d 649, 654, 306 N.E. 2d 777, 780 (1973).[3] Petitioner's characterization of Ms. Tseng's response to this treatment in its "Nature of the Case" as not "object[ing] to the search" should not connote that she consented to it. She was given no choice. She was made to feel imprisoned, was ordered about by EL AL's uniformed security personnel and cowed and intimidated into submission by their display of power. (A61).

> Q. How did you feel while you were undergoing this sort of thing?
>
> A. I was really furious, and I felt that I was like in that little room, I was like raped.
>
> Q. Why didn't you just get up and walk out?
>
> A. I felt like I was a prisoner in that little room. I didn't have freedom to leave that room.
>
> Q. Did they tell you could leave?

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2. The District Court below, *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 158 (1996) noted that EL AL failed to define a reason for subjecting Tseng to the particular treatment she received.

3. *See* footnote 33.

A. No.

Q. Did anybody tell you don't have to be examined, you can leave if you want?

A. No. Nobody tell me that. I was just like locked up in this little room with all the police [sic] there.

Q. When you say there were police, who are you referring to?

A. These people searching me and checking my — taking out my things from my luggage.

Q. Why do you call them police?

A. They look like police. Like secret agent or something.[4]

Consent given under duress is ineffective. *Restatement Torts 2d* § 892B(3). At a trial where the liability issues were explored, Tseng's proof was unchallenged. The procedures followed were admittedly standard for EL AL. (A113, 118)

SUMMARY OF RESPONDENT'S ARGUMENT

1. It is impermissibly absurd and strains interpretative reasoning beyond the breaking point to read into the very Convention which subjects airlines to strict liability for accidental bodily injuries an unspoken grant to airlines of freedom to imprison, assault and batter their passengers, immunizing them from local law requirements that they compensate their victims.

2. The Warsaw Convention [5] should not be construed to bar passenger actions against airlines for injuries due to willful tort, including assault and battery and false imprisonment.

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4. Her impression that the security personnel were police was not far-fetched. They are similar, at least, to "law enforcement officers". 14 C.F.R. § 129.25(h)(1).

5. "Convention for the Unification of Certain Rules Relating to International (Cont'd)

3. Where a passenger is injured within a state as a result of an airline's nonaccidental willful torts under state law, *viz* assault and battery and false imprisonment, the airline's liability is based on the state law ordinarily applicable to private persons. The Warsaw Convention does not exclude airlines from generally applicable local tort law subjecting willful tortfeasors to the requirement that they be held in damages to their victims.

4. An unexpressed preemption of the state tort law of civil liability for assault and battery and false imprisonment and other willful torts should not be read into the Warsaw Convention.

5. The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law, and Articles 17 and 24(2) of the Convention permit damages for legally cognizable harm resulting from willful wrongdoing. They leave specification of such harm to the domestic law applicable under the forum's choice-of-law rules. *Zicherman v. Korean Air Lines Co., Ltd.* 516 U.S. 217 (1996).

(Cont'd)
Transportation by Air", Concluded at Warsaw October 12, 1929, and Entered into Force for the United States October 29, 1934. 49 Stat. 3000 (Text codified and appended to 40 U.S.C. § 40105).

ARGUMENT FOR RESPONDENT

I. IT IS AN ANOMALOUS AND IMPERMISSIBLE ABSURDITY TO CONCLUDE ON THE BASIS OF THE CONVENTION'S IMPOSITION OF LIABILITY ON AIRLINES FOR ACCIDENTAL BODILY INJURIES A WARRANT FOR THEM TO IMPRISON, ASSAULT AND BATTER THEIR PASSENGERS ON STATE TERRITORY FREE OF THE CIVIL ACCOUNTABILITY TORTFEASORS OWE TO THEIR VICTIMS UNDER STATE LAW.

As applied, the *Question Presented for Review* boils down to whether Article 17 of the Warsaw Convention imposing strict liability on airlines for accidental bodily injuries to their passengers licenses them to imprison, assault and batter their passengers with impunity contrary to state tort law. EL AL depends on a grotesque and indefensible "Yes" answer to that question. In its brief (p. 38), it makes that clear:

> *The unamended Warsaw Convention limits carrier liability exclusively to injuries caused by "accidents" . . . ; carriers are not liable for "events' " other than "accidents' and there is no right of recourse to national law."*

Article 17 subjects airlines to strict liability[6] for accidental bodily injuries. At bar, under the accepted common law principles to which New York adheres, petitioner's conduct amounted to assault and battery and false imprisonment, classically intentional wrongs where committed.[7] The *Question* presented for review by

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6. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

7. A. **False imprisonment**: *Broughton v. State of New York*, 37 N.Y. 2d 451, 373 N.Y.S. 2d 87 (1975), *cert. den. sub nom., Schanbarger v. Kellogg*, 423 U.S. 929, 96 S. Ct. 277 (1975); *Holt v. State of New York*, 29 N.Y. 2d 573 (Cont'd)

the petition on which *certiorari* was granted correctly assumes the event here was no Article 17 accident. Petitioner would have Article 17 reach over and preclude recovery for a passenger's injuries resulting from such intentional wrongs simply because they did not occur accidentally. It would leave its victim stripped of rights. *Its* Convention would endow it with free reign to injure passengers by willful tort with impunity and utter abandon. As applied, a "Yes" to the *Question Presented for Review* would have that result.

Petitioner's *amicus International Air Transport Association* (IATA) adopts El Al's view of The Convention with its incongruous consequences. It criticizes the Second Circuit's decision in its brief (IATABr) because,

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(Cont'd)

(1971); *Scholl v. City of Utica*, 163 A.D. 2d 909, 559 N.Y.S. 2d 827 (1990) **Note i:** Intent to harm is not an essential element of the tort (*Holt*) but intent to confine is (*Broughton*). **Note ii:** Lack of consent to confinement is a linchpin to liability (*Broughton*). B. **Assault and battery**: *Schloendorff v. The Society of the New York Hospital* (*per* Cardozo, J.) 211 N.Y. 125, 105 N.E. 92 (1914); *Jones v. State of New York*, 33 N.Y. 2d 275, 352 N.Y.S. 2d 169 (1973); *Maines v. Cronomer Val. Fire Dept.*, 50 N.Y. 2d 535, 429 N.Y.S. 2d 622 (1980); *Sphere Drake Insurance Company v. 72 Centre Avenue Corp.*, 238 A.D. 2d 574, 657 N.Y.S. 2d 65 (1997) ("intrinsically intentional act of assault"); *Smith v. The Limited*, 237 A.D. 2d 345, 655 N.Y.S. 2d 418 (1997); *Villanueva v. Comparetto*, 180 A.D. 2d 627, 580 N.Y.S. 2d 30 (1992); *Laurie Marie M. v. Jeffrey T.M.*, 159 A.D. 2d 52, 559 N.Y.S. 2d 336 (1990); *Rubino v. Ramos*, 226 A.D. 2d 912, 641 N.Y.S. 2d 409 (1996); *Locke v. North Gateway Restaurant, Inc.*, 233 A.D. 2d 578, 649 N.Y.S. 2d 539 (1996); *Staudacher v. City of Buffalo*, 155 A.D. 2d 956, 547 N.Y.S. 2d 770 (1989); *Oates v. New York Hospital*, 131 A.D. 2d 368, 517 N.Y.S. 2d 6 (1987); *Jones v. State of New York*, 96 A.D. 2d 105, 468 N.Y.S. 2d 223 (1983); *Noschese v. City of New York*, 53 A.D. 2d 566, 384 N.Y.S. 2d 822 (1976); *Budgar v. State of New York*, 98 Misc. 2d 588, 414 N.Y.S. 2d 463 (1979); *Masters v. Becker*, 22 A.D. 2d 118, 120, 254 N.Y.S. 2d 633 (1964); *United National Insurance Co. v. Waterfront New York Realty Corporation*, 994 F.2d 105 (2d Cir 1993). **Note iii:** Intent to harm is not a necessary element of the tort (*Schloendorff, Maines, Villanueva, Oates, Masters*), though intent to make contact is (*Villanueva, Masters,*). **Note iv:** Lack of consent to harmful touching is a linchpin to liability. (*Schloendorff*).

> if affirmed, it would create [*sic*] liability in the absence of both the accident — *i.e.*, "an unexpected or unusual *event* or *happening* that is external to the passenger, *Air France v. Saks*, 470 U.S. 530, 535-36 (1991) (emphasis added [by IATA]) — and the physical injury prerequisites to recovery under Article 17 . . . (IATA Br, 4)

Hence, the argument runs, if the injury is not accidentally caused but the effect of intentional tort, a prerequisite to recovery under Article 17 has not been met and the intentional tortfeasor is safe home and free of any obligations to its victim. Such is the logic of petitioner's case.

Petitioner deduces this odd freedom to commit intentional tort against passengers from Article 17's strict liability coverage of accidents and its omission to refer to intended misconduct. Deriving a free pass from the treaty for EL AL to commit tort against passengers so long as carried out intentionally and not accidentally is *reductio ad absurdum*. It stretches the canons of interpretation beyond the breaking point. Treaty constructions which "create an absurd anomaly" as does petitioner's cannot stand. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 179-80 (1993) (involving a U.N. Convention Relating to the Status of Refugees). To read into the same Convention which opens wide the courtroom doors to victims of accidental happenstance a mandate to slam the doors shut against victims of intentional wrongdoing is to implant into the body of the Convention "an absurd anomaly".

Implausibility alone has been held an important factor in rejecting a defendant's proposed interpretation of a statute which would effectively have denied plaintiffs state law protection from injuries caused by defective products *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996). Implausibility also played its role in the Court's rejection of an argument as to the "shared expectations of the contracting parties" related to the Warsaw Convention itself. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. at 223 (1996); *also Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, at 128 (1989).

The law does not "lag behind common sense." *Ludecke v. Watkins*, 335 U.S. 160, 166-167 (1948). As the strained construction of the treaty urged by petitioner is implausible and preposterous, *ergo* it is impermissible. It is at odds with the principle which, by analogy, eschews absurd and irrational statutory interpretations. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States v. One Parcel of Real Estate*, 41 F.3d 1448, 1452 (11th Cir. 1995). The same teaching applies to construction of treaties ratified by the Senate (*see Toop v. Ulysses Land Company*, 237 U.S. 580, 35 S. Ct. 739 (1915)), not excluding the Warsaw Convention.

A treaty's interpretation takes into account its "nature [as] a contract between nations" and that " 'general rules of construction apply.' " *Societe Nationale Industrialle Aerospatiale v. United States District Court*, 482 U.S. 522, 533 (1987), citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984). *Ritter v. Mutual Life Ins. Co.*, 169 U.S. 139, 156 (1898) states one of those rules:

> One rule of [contract] interpretation is that we must never attribute an absurd intent if a sensible one can be extracted from the writing.

Trans World v. Franklin Mint involved construction of the Warsaw Convention. It was trenchantly noted by Stevens, J. (dissenting op., 466 US, at 262):

> As with any written document, there "is a strong presumption that the literal meaning is the true one, especially as against a construction that is not an interpretation but perversion."

More recently to the same effect was *Chan v. Korean Air Lines*, 490 U.S. at 130, rejecting a desired interpretation of the Warsaw Convention which "produces absurd results."

The adverse public policy implications of reading a treaty ratified by the Senate to cloak airlines with freedom to assault and

batter and falsely imprison their passengers without incurring civil liability need not be belabored. The Convention drafters did not envision that air carriers would commit such willful torts against their passengers. But if an airline should transgress, they surely did not think to award the willful tortfeasor with immunity from civil liability. If the roguish thought entered any minds, it went no further. Treaties as other laws should be accorded a "sensible" construction (*Geofroy v. Riggs*, 133 U.S. 258, 270 (1890)), which petitioner's is not.

Petitioner's proposed construction is not an interpretation but a bizarre perversion. The Second Circuit below pointed to the absurdity in petitioner's reading of the Convention:

> Such a reading would lead to the absurd result of allowing carriers to escape liability for their negligence — or even their intentional torts — so long as the event giving rise to the injury was not an accident
> * * *

(*Tseng v. EL AL Israel Airlines*, 122 F.3d 99, 106).

Attempting to sidestep the absurdity of petitioner's treaty construction, petitioner's *amicus Air Transport Association of America* (ATA) in its *amicus* brief in support of petitioner (ATA Br.) at p. 22, argues that conducting a security search in an intentionally tortious manner "is certainly unexpected by the passenger and unusual for the airline" and "would thus be an 'accident' covered by the Convention and the airline would be liable."

Except for the concession that the airline's intentionally tortious acts are certainly unexpected by the passenger, true of most willful tort victims, this is baseless. The airline, as the district court found, deliberately conducted the search of Ms. Tseng in the manner prescribed by its own procedures. (*n. 8, post; also Argument II below*). The conduct which it planned and carried out was neither unexpected nor unusual to it and no "accident".

A state citizen should be entitled to the protection of state willful tort laws when falling victim to such wrongs on state territory. The Convention says nothing about the subject, save in Article 25 which specifically respects such laws. It should not lightly be construed to deny them that protection.[8]

Petitioner, referring to the Convention's drafting history in its brief, candidly notes that "The Warsaw Convention minutes are probably 'more notable' for their lack of discussion regarding preemption" and that "the one and only comment expressly relating to the preemptive language of Article 24 was by the British Delegate." (Petitioner's Brief (Pet Br.) 35). Not even that lone British comment argues a broadening of the Article 17 term, "accident", the subject of Article 24(2)'s preemptive provisions for personal injury claims, to preempt an air carrier's willful wrongdoing. This hardly demonstrates a consensus among delegates that the language of Article 24 carries preemption beyond Article 17 accidents into the area of intentional tort.

Neither petitioner nor any of its *amici*, all of which purported extensively to review the relevant Convention drafting history, could document the least desire among those who formulated the Convention and who later applied it that air carriers were to be protected from civil responsibility for wrongs they intentionally commit against passengers or to preempt local laws that provided remedies for such willful wrongs. IATA elaborates on "Intercarrier Agreements" and "Agreements on Measures to Implement" the same (IATABr 16-18). Admittedly they are confined on their face to injuries "within the meaning of Article 17", namely accidental injuries. Appendix D to IATABr demonstrates that petitioner EL

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8. Note *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940), for the respect accorded to state common law rights by this Court, and *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238, 251 (1984) for this Court's denial of non-expressed federal preemption of state common law protection afforded persons on state territory. Also see discussion of unexpressed preemption of state law under Argument VI, post, and of Article 25 under Argument VIII, *post.*

AL ISRAEL AIRLINES was not a signatory to such agreements, whatever effect they might conceivably have had on respondent's cause of action which had already accrued some years earlier. As for the incompleted "modernization" of the Convention (IATABr, 18-20), that is a task for the parties to the Convention, not the Court on this appeal which calls for a ruling on the state of the law at the time of the occurrence some five years ago, and not as it may be if "modernization" takes place in the future. The Court can only inform, not hamper, that modernization process.

II. PETITIONER'S CONDUCT WAS NOT ACCIDENTAL AND THIS ELIMINATES ARTICLE 17 AS A FACTOR IN THIS CASE.

A consent to search is not deemed voluntary in New York when one bows to a display of authority.[9] Respondent succumbed to a display of uniformed police-like authority on the part of petitioner. She did not consent.

Horrifying as the experience was to respondent, petitioner's conduct was not accidental to it as it must be to invoke Article 17 with its exclusion of passenger recourse for non-bodily injuries. It was an intentional carrying out of company policy (A113, 118), rather than an "unintended and unexpected occurrence which produces hurt or loss" or "unexpected or unusual event" or "unforeseen event" or a "fortuitous, unexpected, unusual, or unintended event" within definitions of "*accident*" as used in Article 17 *per Air France v. Saks*, 470 U.S. 92, 398-400 (1985).[10] The

9. *People v. Cameron*, 48 A.D. 2d 783, 369 N.Y.S. 2d 418 (1975).

10. . . . the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence" . . . the text of Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury. In the light of the many senses in which the word "accident" can be used, this distinction is

(Cont'd)

district court found that "The actual techniques for carrying out the search were prescribed by El Al's procedures".[11] Following its own procedures was clearly not unintended, fortuitous, unexpected, unusual or unforeseen for EL AL. It intended, foresaw and expected what it had designed. True, Tseng did not expect it. Innocent victims of willful wrong rarely do. Tseng's innocence of EL AL's designs does not convert an intentional wrong involving *scienter* into a happenstance.

Petitioner and its *amici* have waffled on whether respondent was injured by an accident. Petitioner and *Amici* US and ATA try to straddle the fence. Petitioner's IATA *amicus* contends for no accident.

Petitioner itself had urged it was below. It then argued the treatment accorded respondent was accidental and within the

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(Cont'd)

> significant. . . . The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. . . . In Article 17, the drafters of the Warsaw Convention. . . specified that air carriers would be liable if the accident caused the passenger's injury. . . the French legal meaning of the term "accident" differs little from the meaning of the term in . . . the United States. . . . The text of the Convention consequently suggests that the passenger's injury must be caused by an unexpected or unusual event. *Zicherman* later added this meant "an unforeseen event".

516 U.S. at 223.

11. *Tseng v. El Al Israel Airlines, Ltd.*, 919 F. Supp. 155, 158 (1996).

In its *post Tseng* decision, *Fishman v. Delta Air Lines*, 132 F.3d 138 (1998), at 142, the Second Circuit, recalling the record at bar which had recently been before it, observed: "the particular search conducted by the defendant in *Tseng* was called for by the airline's normal, everyday procedure, and did not deviate from it."

limitation to accidental "bodily injury" of Article 17. Excluded from Article 17 rights are claims for accident-caused traumatic stress or psychic injury (*Eastern Airlines v. Floyd*, 499 U.S. 530 (1991), and this was the reason for petitioner's lower court argument. But the cause in *Floyd* was brought under Article 17. It differs from the instant action for intentional wrong based not on Article 17 but on state tort law.[12]

But as the case moved into this Court, in petitioning for *certiorari*, petitioner appeared to depart fundamentally from its original position. It refrained from arguing that the crucial event was an accident. Its omission to make that contention in its petition was noted and approved by *Amicus* US (*see Amicus* US brief "Supporting Petitioner" (SG #2) at p. 18). This concession had been noted and approved at the start by *Amicus* US in its original brief. (SG #1, 11) [13] But now petitioner casts hints and suggestions in note 17 of its brief that it might be interpreted to be one, contrary to the plain English (and French) meaning of "accident" in Article

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12. Unlike the case at bar, founded exclusively on state-law tort, the plaintiffs in ***Floyd*** asserted "two state-law tort claims, a state-law claim for breach of contract, and a claim for recovery under the Warsaw Convention." The case came to this Court solely on the Convention cause, the state-law claims having already been dismissed below on Florida state-law grounds. (***In re Eastern Airlines, Inc., Engine Failure, Miami Int'l Airport***, 629 F. Supp. 307 (S.D. Fla. 1986)). ***Floyd*** expressly "address[ed] only the theory of recovery claimed under the Warsaw Convention." 499 U.S. 534 (n.2) No such theory is advanced here. Similarly, in ***MacDonald v. Air Canada***, 439 F.2d 1402 (1st Cir. 1991), cited in ***Tseng*** as holding that the finding of an "accident" under Article 17 is a prerequisite to liability to a passenger, the state law negligence causes were first dismissed for insufficient evidence and the dismissal for no proof of "accident" was limited to the remaining Article 17 cause of action, a cause not asserted at bar.

13. We believe it would be appropriate for this Court to accept the parties' agreement on that issue: a routine security search that complies with federal standards, as this one apparently did (*see* Pet. App. 41), should not be characterized as an "accident."

17 set forth in *Saks*. It does not contend that it was, but petitioner cagily leaves the matter up in the air.

Without a clearly stated claim that this case evolved from an accident, petitioner has abandoned reliance on Art 17. As this Court pointed out in *Floyd*, 499 U.S. at 535-536, the very first condition to Article 17's applicability is that there have been an accident. Shifting to a new tack, petitioner can only be read to urge that for the very reason its tort was *not* accidental within the *Saks* definitions, its very willfulness which makes its acts not accidental immunizes it under the no longer applicable Article 17. It is unlikely that the Warsaw Convention's architects and the ratifying Senate had that in mind.

Article 17's application at bar would be equally absurd, given its plain language and strict liability implications. By the district court's reasoning, the passenger search here with all it entailed was an "accident" because what led to it was a mistaken suspicion of a person with a ticket seeking to board the plane who turned out to be an innocent traveler. It dismissed her case because she was innocent. By that approach, every mistake leading to a search, however honest, would render the search an "accident" and lead straight to Article 17 strict liability in case of ensuing bodily injury. In the court's understated opinion below,

> To suppose the drafters of the Convention aimed to impose close to absolute liability on air carriers for searches that disclosed no danger seems to us highly unlikely.

Tseng v. El Al Israel Airlines, 122 F.3d 99, 103-4 (JA52).

Hoping to escape the accident requirement of Article 17 not met here, EL AL falls back on Article 1 of the Convention for Unification of Certain Rules. Article 1 provides that the Convention shall apply to "all international transportation of persons" by aircraft. Application to "all international transportation of persons" is quite consistent with the limitation of Article 17 to "accidental" injuries.

Petitioner would convert Article 1 from what on its face only outlines the area in which the Convention applies to a provision preempting all other law in that area, even though state law of intentional tort does not conflict with the Convention and even if preemption is not expressed in it. Petitioner would have Article 1 alter the scope of Article 17 from accidents, as it provides, to "passenger injury" however caused,[14] even when by intentional airline wrongdoing. That contorted reading is necessary for petitioner to bring the cause at bar within the coverage of Article 17 and so invoke the exclusivity provisions of Article 24(2). Nothing in Article 1 warrants such a reading.

Amicus IATA similarly refers to "the jurisdictional scope of Article 17" as though mere scope or area of coverage is enough to preempt non-accidental intentional torts when the Convention drafters made no effort to do so. (IATA Br., 12).

Amicus US, in a remarkable display of self-contradiction, after conceding that the precipitating event could not properly be termed an "accident", in the same brief supporting review by this Court and now in its *Amicus* brief supporting petitioner on the merits turns around and makes a last gasp try to salvage the "accident" label anyway. The US goes back and adopts EL AL's original position in the Court of Appeals that the cause arose from an accident and which, with the blessing of US, petitioner did not include in its petition for *certiorari*. At SG #1, 16, fn. 7, undoing its blessing, US argued that

> the definition of "accident" had been "flexibly applied" in this context to include not just inadvertent harms, but reckless and even intentional torts as well, such as "torts committed by terrorists." *Saks*, 470 U.S. at 405.

And now in its second brief (SG #2, 18, fn. 11), US substantially repeats the same contention.

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14. Petitioner ignore *Saks* which sharply distinguished "accident which caused the passenger's injury" referred to in Article 17 from "accident which is the passenger's injury" which is not within the intendment of Article 17.

"Accident" is not an ambiguous term and has not been so flexibly applied. *Amicus* US forgets the teaching of *Saks*, *supra*: a basic characteristic of an Article 17 "accident" is that it be "unintended" by the air carrier.

US "proves" its point with examples which are not "in this context", if that means context of this case. They are of intentional torts inflicted by third persons, not by the air carrier itself. The reference to "torts committed by terrorists" in *Saks* as accidental to airlines does not establish that intentional torts committed by airlines themselves are accidental to airlines. *Saks* is squarely to the contrary. The US's "insurance law" contention ("intentionally inflicted by a third person") is subject to the same infirmity. SG Br. 16, fn. 7[15]

If the intentional wrongs committed by third parties are Art.17 "accidents" subjecting airlines to strict liability, this "expansive scope of the term 'accident'" in no way answers "the Court of Appeals' concern that carriers not escape liability for *their* intentional torts", as US asserts at SG Br. 16, fn. 7. (Emph. added).

While respect is due to the executive's views on treaty interpretation, deference should not be given where those views are unreasonable and illogical.

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15. Under the insurance law, where an assured itself intentionally commits tort, it is not accidental as a matter of law so as to entitle the assured to coverage under an accident policy. *Technicon Electronics Corporation v. American Home Assurance Company*, 74 N.Y. 2d 66 (1989); *e.g. St. Paul Fire and Marine Insurance Company v. Warwick Dyeing Corporation*, 26 F.3d 1195, 1202 (1st Cir. 1994), construing a policy covering property damage resulting from an assured's accidental pollution discharge:

> The courts are practically agreed that the words "accident" and "accidental" mean that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual and unforeseen.

Aetna Casualty & Surety Co. v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992) (quoting *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 364 (8th Cir. 1966)). "We think it would strain common sense to find that ACME's disposal of Warwick's waste in a landfill was unexpected or unintended by Warwick [the assured]."

As noted, both petitioner and *Amicus* US (despite its reference to third party terrorists and the insurance law) agree that the event was no *accident*. The original French text of Art.17 uses the word "*l'accident*" for the triggering event.[16] It was no *l'accident* in the original French any more than in the English sense of the word (*see Saks*, *supra*). The same word in each language specifically means what this Court in *Saks* said it meant. If there was any doubt, the later *Zicherman*, 516 U.S. at 223, made it very clear that in *Saks*, it had

> determined that in French legal terminology the word "*accident*" referred to an unforeseen event.

The signatories' delegates who drew up the convention were at no loss for generic French words such as *l'événement* and *la occurrence*, These terms are broad enough to include any event, accidental or intentional, if that is what they intended[17]. They are not specifically limited to accidental events as is *l'accident*, the term the signatories employed in Article 17.[18] The delegates knew the difference. Where *l'événement* was intended, as in Article 18, it was used. Text language in treaty interpretation is not to be brushed

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16. Set forth in 94 Stat. 3005 and in *Air France v. Saks*, 470 U.S. 392, 398 (n.2).

17. *Cassel's French Dictionary* (1962) 7, 324, 416, 520. *Also* Giemulla/ Schmidt, *Warsaw Convention*, Kluwer Law International, The Hague, London, Boston, Suppl., 4 (October 1994), WC Art. 17, p. 10, pointing to the significance of use of the term *accident* rather than the word *l'événement*, a "broader term" meaning "event" which term when intended is used elsewhere in the Convention, *e.g.* Art. 18.

18. As noted by petitioner in its brief (Pet. Br. 37), the treaty signatories were quite sensitive to Art. 17's employment of the term "accident" instead of "event" when at Guatemala City in 1971 their delegates made an effort to substitute "event" for "accident" in Art. 17, failing to make the change effective for lack of a sufficient number of ratifiers.

aside, especially where the text is clear. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. at 134 (1989).[19]

The drafters' use of the French word for accident in Article 17 is not ambiguous. It could not be clearer.

> "[T]o alter, [* * * 21] amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. Neither can this Court supply a casus omissus in a treaty, any more than in a law. We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops — whatever may be the imperfections or difficulties which it leaves behind. *The Amiable Isabella*, 6 Wheat. 1, 71 (1821)." *Chan v. Korean Air Lines*, 490 U.S., 135.

As this Court pointedly held in *Air France v. Saks*, 470 U.S. 398, by providing for liability to injured passengers due to an "*accident*" in Article 17 and for baggage loss due to an "*occurrence*" in Article 18, word differences meant something.

> This difference in the parallel language of Articles 17 and 18 implies that the drafters of the Convention understood the word "accident" to mean something different than the word "occurrence," for they otherwise logically would have used the same word in each article . . . The language of the Convention accordingly renders suspect the opinion of the Court of Appeals that "accident" means "occurrence."

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19. Also note concurring opinions of Justices Kennedy and Scalia in *United States v. Stuart*, 489 U.S. 653 (1989), at 370 and 371 respectively.

Hence, far from making Article 17 all-embracing to cover *all* personal injuries and employing a term available to them to make it so, the drafters deliberately used a term limited to "unexpected or unusual events", or "unforeseen events" as was held to be the case by this Court in *Saks* and later, *Zicherman*. It is only to those unexpected, unusual, or unforeseen events that Article 17 can be regarded as exclusive.

The Fifth Circuit in *Potter v. Delta Airlines*, 98 F.3d 881, 887 (1996) thought the views of delegates to the Guatemala City International Conference on Air Law in 1971 demonstrated that Article 17's use of the term "accident" was outmoded and that in the eyes of the international community "event" should replace "accident" in Article 17. This is clear error. If it did, Article 24(2) would have preempted the Delta occurrence. In fact, the opposite is demonstrated and in the end the *Potter* court agreed.

Those Guatemala City delegates did express dissatisfaction with the word "accident", with its narrow import in Article 17 and a desire to substitute the broader term "event" for it. *See Air France v. Saks*, 470 U.S. 403-04. They issued the *Guatemala City Protocol of 1971* to incorporate this change, but this failed for lack of ratifiers, including the United States. The *Saks* Court, after taking *Guatemala City* into account, concerned itself with the meaning of "accident", defined it as described and Article 17 remains unchanged. The result of *Guatemala City* serves as an interpretative aid to the Convention. It highlights the signatories' recognition of the difference between "accident" and "event" and speaks to the significance of the continued retention of "accident" and its non-replacement by "event" in Article 17's text.

When it came down to it, the Fifth Circuit accepted this as a fact. If "accident" had become as broad a term as "event" in the context of Article 17, the occurrence resulting in injury to Mrs. Potter on the Delta flight would have been included and covered by Article 17 and expressly have been preempted by Article 24(2). *Potter* recognized it was not that broad. Without preemption

expressed anywhere in the Convention, to find it *Potter* had to imply it. 98 F.3d at 885.

Petitioner's *Amicus* IATA (IATABr, 4) straight off argues that *because* the event was *not* an accident it should be deemed preempted by the Convention.

If the text of Article 17 *per se* were not enough, no evidence that the framers possessed the unlikely intent to embrace intentional tort along with accidents within Art.17 under the term *l'accident* has been culled by petitioner and its supporting *amici* from the drafting history or context to expand the language used beyond its plain meaning.

Accordingly the case at bar arising from an intended event, is not embraced within the scope of Article 17 but belongs outside the Convention and its restrictions.

III. ARTICLE 24(2) PLAYS A DEFINING ROLE BY NOT INCLUDING INTENTIONAL TORT WITHIN THE SCOPE OF THE CONVENTION'S EXCLUSIVITY BUT INSTEAD LIMITING EXCLUSIVITY IN PERSONAL INJURY CASES TO ACCIDENTS COVERED BY ARTICLE 17.

The only reference in the Convention to Article 17 exclusivity appears in Article 24(2). Without exclusivity or preemption under Article 24(2), there is none under the Convention.

Exclusivity is imparted to various portions of the Convention by Article 24. Article 24(1) imparts it to cases covered by Articles 18 (baggage and goods) and 19 (delay), not pertinent here. Whatever exclusivity Article 17 could possibly have had here would be a product of Article 24(2). It furnishes it so long as the case is "covered by article 17". The case at bar is not. As noted, *Eastern Airlines v. Floyd* made clear that the first requisite to coverage by Article 17 is that there have been an "accident" (499 U.S. at 535-36). It is beyond cavil that the occurrence herein was not an accident

and was not "covered by Article 17". Exclusivity of Article 17 in the area of intentional tort is unauthorized by Article 24(2) or any part of the Convention and does not exist. To extend the scope of Convention exclusivity beyond what the Convention provides would require an improper judicial redrafting of Article 24 or Article 17, and this is barred. *Chan v. Korean Air Lines, Ltd.*, 490 U.S. at 135; *Air France v. Saks*, 470 U.S. at 406.

The clause in Article 24(2), "without prejudice" to the "respective rights" of plaintiffs as a further exception to any imputed exclusive effect of Article 17 can only be meaningful if the door is left open to the assertion of "rights" based on other law. The very term "rights" signifies a legal basis. It is a term contained in a clause providing that rights derived not from Article 17 but elsewhere are not within the exclusive provisions of that Article. Local law is left standing as a basis for those other rights by Article 24(2).

Exclusivity leads to preemption of local law. The Convention nowhere expresses preemption if the injury causing occurrence is not an Article 17 "accident". For all its discussion of the exclusivity provisions of Article 24, the Fifth Circuit in *Potter v. Delta Airlines*, 98 F.3d 881 (1996) ended up agreeing they did not apply. *Potter* acknowledged "the Convention has not expressly preempted state law" (*i.e.* by exclusivity of Article 17) and so it implied it. (98 F.3d 885) Petitioner depends upon implanting an unexpressed *implied* preemption of state law into the Convention to uphold its contentions. The Convention does not state that it exclusively governs so as to preclude willful tort liability. And so it does not under *Zicherman*. Petitioner offers no compelling reason why the case at bar should present the occasion to upset this settled law.

The Convention does not purport exclusively to cover the field, but only "certain" parts of it. Far from stating that it is exclusive, the drafters saw to it that the treaty was entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air". Though their existence was apparently envisioned, rules not "unifi[ed]" by the Convention

were not encompassed in it. As noted in *Tseng* below (122 F.3d 105), the drafting history of the Convention shows that the use of that terminology in its title was not accidental. It was the product of an effort to insure that the Convention not be regarded as all-encompassing, blanketing the field to the exclusion of non-conflicting national laws. Indeed the express limitation of the scope of the Convention to "certain rules" played a critical role in the Convention's adoption.

IV. THE SUPPOSED NEED FOR "UNIFORMITY" IN CONSTRUING THE CONVENTION TO RENDER IT THE EXCLUSIVE SOURCE OF REMEDY AGAINST AIRLINES HAS BEEN REJECTED BY THIS COURT IN FAVOR OF LEAVING SPECIFICATION OF THE HARM LEGALLY COGNIZABLE TO THE DOMESTIC LAW APPLICABLE UNDER THE FORUM'S CHOICE-OF-LAW RULES.

Neither *Abnett v. British Airways PLC* 1 All E.R. 193 (H.L. 12 December, 1996) nor *Potter v. Delta Airlines*, 98 F.3d 881, *supra*, poses a conflict with the Second Circuit in this case. Neither *Abnett* nor *Potter* lends support to EL AL's argument that the Warsaw Convention shields it from common law claims of willful wrongdoing. As for *Abnett*, its effect here, if any, depends at the outset on a comparison of the two cases. *Abnett* did not involve intentional tort. The one at bar does. The opinion by Lord Hope in *Abnett* involved common law passenger claims in negligence and breach of implied contract of reasonable care. It arose from a flight delay in Kuwait exposing the passengers to capture by invading Iraqis. In that non-willful wrongdoing case, Lord Hope ruled that Article 17 was the exclusive remedy for passengers. He rested on a felt need for uniformity in construing the Convention but the doctrine he expounded was not in the context of plain common law willful torts, as at bar.

In pursuit of uniformity, Lord Hope overlooked mention of this Court's landmark *Zicherman* holding which came down almost

a year before (16 January, 1996) and which flatly rejected uniformity as a guiding principle in construing the Convention.

> (516 U.S. 225) The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for.
>
> (516 U.S., 229) Congress may choose to enact special provisions applicable to Warsaw Convention cases, as some countries have done. *See supra*, at 635. Absent such legislation, however, Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention.
>
> * * *
>
> We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules.[20]

Thus *Abnett*, calling for "uniformity" as a guide to Convention interpretation, failed to heed its own call but went its own way, establishing a British view unexplainedly differing from the American approach in the earlier *Zicherman*. Signatory states have traditionally applied differing rules in construing various Convention clauses.[21]

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20. Applied by this Court in *Dooley v. Korean Air Lines Co., Ltd.*, 97-704 (decided June 8, 1998) __ U.S. __.

21. *See* extensive signatory state court references throughout *Giemulla/ Schmidt, Warsaw Convention*, Kluwer Law International, The Hague * London * Boston, and Suppls.; *Goldhirsch, The Warsaw Convention Annotated, a Legal Handbook*, Martinus Nijhoff Publishers, Dordrecht/Boston/ London, 1988.

The court below followed *Zicherman's* guidance. It exposed some of the flaws in the *Potter v. Delta Airlines* argument. (98 F.3d 881, 885) *Potter*, like *Abnett* a non-willful tort case, erroneously equated *uniformity* with *exclusiveness* in providing remedies. As it held, the goal of uniformity does not preclude resort to local law when the Convention is not applicable. *Tseng*, 122 F.3d 107 (JA60).

But yet *Potter* does not necessarily conflict with the Second Circuit's *Tseng*. It does not confront the issues at bar. It no more involves a willful tort by an airline than did *Abnett*. In *Potter*, a passenger returning to her seat on a privately owned aircraft caught her foot in a carpet in the aisle as she sought to squeeze into her row past a passenger leaning back and twisted her knee. The court held the unintended occurrence did not fit the meaning of "accident" in Article 17 set by *Air France v. Saks*. (*see* Note 10, *supra*). That left the passenger with state-law negligence claims. *Potter's* broadly stated holding that a requirement of uniformity bars non-accidental occurrence recoveries against airlines was in the context of those claims, not one for willful tort which was not before it.

To the extent that *Potter's* reach be deemed to extend beyond the unintended occurrence case before it, it would take a long stretch to extend it as far as the present case involving *scienter*. Its reasoning is posited upon the dubious assumption, rejected by *Zicherman*, that interpretation of the Warsaw Convention is bound by a requirement of uniformity. *Potter's* rationale for barring negligence claims *via* the *uniformity* route boiled down to:

> Uniformity with respect to liability is required in order to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates can be calculated.

(98 F.3d 885).

That rationale has no application at bar. It can scarcely be contended that requiring airlines to respond to the applicable state tort law when they assault, batter and falsely imprison passengers

on state soil would be unjust or add so much as a jot to operating costs. On the screen of the economics of the international air transportation industry, such an elusive speck would not appear more boldly than a faint blip, if that.

The Warsaw Convention has long exposed Airlines to state tort law liability in cases of willful misconduct. The Convention's Article 25(1) itself expressly rejects uniformity of law, *i.e.* Convention exclusiveness. No unforeseen new burden, if burden it can be called, would be added by an affirmance. If any there be, it is already there. Article 25(1) directs that the law ordinarily to be applied by the trial court, here the *lex delicti*, must govern in such matters.[22] In so doing, it endorses the effectiveness of applicable local law and subjects airlines to it.

Zicherman, followed by the Second Circuit in *Brink's Limited v. South African Airways*, 93 F.3d 1022 (1996), and *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (1996), lately joined by the Eleventh Circuit in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (1997), expressed the principle followed by the court below that "uniformity" is no magic potion for construing the Convention.[23] Indeed, *Zicherman* expressly disapproved an earlier Second Circuit holding under review which had made a felt need for uniformity key even where Convention rights were asserted.

As noted, petitioner's misplaced reliance upon *Abnett* to overstress the need for uniformity in construing rights of international air travelers is undermined by *Zicherman*.

It was earlier observed by the Second Circuit in *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 37 (1975), *cert. den.*, 429 U.S. 890,

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22. *See* text and further discussion under VIII, *post*.

23. In the wake of *Zicherman*, a district court sitting in Florida has recently ruled that the Warsaw Convention is not exclusive as against state law remedies. *Air Express International, Inc. v. Aerovias de Mexico*, 977 F. Supp. 1191 (W.D. Fla. 1997).

> that the protection of passengers ranks high among the goals which the Warsaw signatories now look to the Convention to serve.
>
> Additionally, the purported goal of worldwide uniformity could not have been paramount in the minds of the framers of Article 17, for they contemplated a case-by-case application by the courts that would, to some extent at least, rely on local law.

For its part, the Convention does not expressly preempt all personal injury law governing passenger suits against airlines. The same Fifth Circuit in *Potter,* upon which petitioner relies for the repudiated principle of uniformity noted this to be the case. (98 F.3d at 885).

Exclusivity is not a feature of the Convention. The term is used by petitioner and its *amici* as a code word to justify an interpretation of the Convention whereby airlines are only exposed to liability for Article 17 "accidents" (*i.e., per Saks*, "unexpected or unusual" events) but shielded from common law liability for injuring passengers by intentional torts. The absurdity of this treaty construction has been discussed above.

The reading of the Convention in *Zicherman* (516 U.S. 229) referred to above is precise in this context:

> Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in the absence of the Warsaw Convention. There is little doubt what that law is in this case.

Zicherman tellingly disposes of the "exclusivity" contention:

> The Convention unquestionably envisions the application of domestic law.

(516 U.S., 231).

V. CONTRARY TO THE GOVERNING LAW PETITIONER WOULD READ INTO IN THE CONVENTION A BAN ON RECOURSE TO STATE LAW FOR DAMAGES CAUSED BY NON-ACCIDENTAL WILLFUL TORT WHICH THE SIGNATORIES HAD OMITTED.

If Article 24(2) were not regarded as leaving the door open to assertion of rights other than those provided by Article 17, its "without prejudice" phrase would be meaningless, despite the rule that meaning be given to every clause of a treaty. While "the more liberal interpretation" of the Convention clause is ordinarily to be preferred for rights claimed under it (*Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163, 61 S. Ct. 219 (1940); *Geofroy v. Riggs*, 133 U.S. 258, 271-2, 109 S. Ct. 1676 (1890)), there can be no doubt since *Zicherman* that this rule applies here.

Even were there no Article 24(2), petitioner's statement (Petition, p. 9) that "a right of recourse under state law should not be read into Article 17" stands the question on its head. Petitioner does the reading in. It reads into it an unwritten denial of that right. Summed up, a ban on recourse to state law for non-accidental tortiously inflicted injuries is not expressed in the Convention and should not be read into it. No reason has been offered for abandoning the rule against judicial embellishment of treaties by addition of provisions not there. *Chan*, p. 135, *supra*, citing *The Amiable Isabella*, 6 Wheat. 1, 71 (1821).

The Convention became a United States treaty by Senate ratification.

> It is difficult to believe that Congress would, without comment, remove all means of recourse for those injured by illegal conduct.

Silkwood v. Kerr-McGee Corp. 464 U.S. 238, 251 (1984).

The Second Circuit carefully reviewed the history and language of the Warsaw Convention and properly concluded that

the reading sought by petitioner was unfounded: (122 F.3d 106-7 Pet. p. 20a).

> Given the self-described limitation of the Convention, it seems illogical to extend its scope beyond that for which it explicitly provides. It is not tenable to believe the Convention meant to address the more ordinary type of personal injury without some express statement in the text to that effect. Such a reading would lead to the absurd result of allowing carriers to escape liability for their negligence — or even their intentional torts so long as the event giving rise to the injury was not an accident occurring on an airplane or in the course of embarking or disembarking as narrowly circumscribed by the definition of Article 17's meaning.

With the Convention silent on the matter, New York's public policy as recently reaffirmed by its highest court to reduce rather than increase the obstacles to recovery of damages, whether defendant is a private person or a public body, and that "[l]iability is the rule, immunity the exception", should be applied with the rest of its law. *Brown v. State of New York*, 89 N.Y. 2d 172, 180 (1996). The public policy of New York is in tune with that long ago laid down for treaty construction by this Court in *Bacardi Corp of America v. Domenech*, 311 U.S. 150, 163 (1940); *Geofroy v. Riggs*, 133 U.S. 258, 271-2 (1890) (*see post*).

New York State's common law of assault and battery and false imprisonment is of general applicability. Realistically its application can have no burdening effect on international air transportation. Protection of the airline industry from such causes of action was hardly in the minds of the drafters and ratifiers of the Convention whose silence on the subject of intentional airline tort in the text was eloquent in expressing what was *not* within their shared expectations.[24] No unreasonable hardship will be imposed on an

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24. Except for Article 25, discussed *infra*.

air carrier if made to respond in damages to passengers it injures by willful wrong in the same way as other tortfeasors. Nothing in the Convention carves out a special exemption of airlines from the several laws of general application of the signatories which entitle victims of willful tort in their territories to redress, or indicates that the signatories intended to abandon the protection afforded by their own several tort laws to the public in such circumstances.

If the Convention was indeed intended as the exclusive vehicle for maintaining a cause for willful wrongdoing, Article 25 would permit the action despite any limitations or exclusions found elsewhere in the Convention. *See* discussion under VII, *post*.

Amicus US contends that Article 25 "is not at issue in this case", on two grounds. (SG #1, 12,13) (SG #2, 18 fn. 10) The first was that the district court found, "as a factual matter, that petitioner's actions were not willful," and that "In the court of appeals respondent did not squarely challenge that factual finding as clearly erroneous". US concedes that respondent did indeed invoke Article 25, arguing "principally that the kind of torts here are 'willful' as a categorical matter and that anything 'willful' cannot qualify as an 'accident' under Article 17."

The first ground is groundless. The district court ruled:

> Accordingly, I find that it was not such wilful misconduct as might take the case outside the Convention's limitations of liability under Article 25.

(JA 31).

This was not a finding of fact. It was merely the district court's legal conclusion that "it was not *such* wilful misconduct as might take the case outside . . . Article 25."

Respondent preserved its argument in the court of appeals that the district court erred in that legal conclusion. The Second Circuit rejected petitioner's Article 25 argument, not because of a

district court "factual finding that petitioner's actions were not 'wilful' " which respondent did not attack, but for very different reasons discussed below in Argument VII.

As a second ground, *Amicus* US asserts that respondent "has not preserved any argument that Article 25 affects the exclusivity analysis in this case", not having cited Article 25 by name in her brief in opposition to the petition (conceding that respondent's brief continued to "characterize petitioner's conduct as 'willful' " (SG #1, at 13)), that being the substance of Article 25. She did so some eight times. For good measure she used the synonymous characterization of that conduct, "intentional", yet four additional times.

Amicus US cites this Court's Rule 15.2 for its "not preserved" contention. Rule 15.2 refers to the obligation of respondent's counsel to point out perceived misstatements in the petition in the opposing brief, and not later. No misstatement regarding Article 25 was perceived in the petition, which does not so much as advert to it. Rule 15.2 further provides that "Any objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the Court's attention in the brief in opposition." Respondent's *Counter-Statement (1) of the Questions Presented for Review* in her brief in opposition to *certiorari* called the Court's attention to her objection to consideration of the first Question as petitioner presented it. No more specific objection, if indeed any was needed, should be required to preserve the Article 25 contention.

Amicus US concluded that "Article 25 presents no obstacle to this Court's review of the exclusivity issue presented here." But now that review has been granted, Article 25 stands as an obstacle to petitioner's prevailing on the merits.

VI. PREEMPTION OF THE STATES' COMMON LAW OF PERSONAL INJURY TORTS IS DISFAVORED AND CONTRARY TO THE PRESUMPTION AGAINST IT.

The *Question Presented* effectively calls for a ruling whether the Convention preempts the state common law on which respondent predicated her causes of action. There remains a strong principled presumption against preemption of state common law in the area of personal injury torts. Though there are none here, even legislatively expressed preemptive clauses are presumed inapplicable.

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996), dealt with an argued preemption of state common law personal injury claims by a federal statute. Unlike the Convention here, that statute did contain specific preemptive language. The Court noted:

(p. 475)

> Throughout our history the several states have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily and historically", . . . matters of local concern, [. . .] the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." [. . .] * * *

(p. 484-85)

> As in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 [. . .], we are presented with the task of interpreting a statutory provision that expressly pre-empts state law. * * *
>
> * * * because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes

> of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," [. . .] we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." * * * we used a "presumption against the pre-emption of state police power regulations" to support a narrow interpretation of such an express command in Cipollone [. . .]. That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> (p. 487)
>
> * * * It is, to say the least, "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.

Silkwood v. Kerr-McGee Corp, 464 U.S. 238, 251 (1984).

Also note *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 654 (1995), to similar effect.

Where this Court has found implied preemption, certain criteria were first met. These were laid out in *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992): (1) If "field preemption", where the scheme of the putative preemptor's regulation is so pervasive as to leave no room for local law to supplement it; (2) if "conflict preemption", where compliance with both the putative preemptor's and local regulations is a physical impossibility; and (3) where local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the putative preemptor's. The principles should be as applicable to treaty preemption as to statutes'.

None of these applies to justify an implied preemption by the Convention and the ratifying Senate of a state's common law torts of assault and battery and false imprisonment. The scheme of the Convention is not so pervasive as to embody a remedy for those willful torts and occupy the field. It lacks any remedy and willful airline torts are not within its scope. Nor is there such (or any) inconsistency between common law willful tort law and the Convention as to make compliance with both a "physical impossibility". The "full purposes and objectives" of the signatory states will not be affronted by allowing passengers a right of civil redress for intentional wrongs committed against them.

If preemption were to be applied here, it could be necessary to hold that while a state law affecting the rights of passengers injured as a result of accidents in international flights may be preempted by Article 17, the preemptive effect is so broad as to extend to non-accidents, here to assault, battery and false imprisonment. This was rejected below for good reason stated. *Tseng*, 122 F.3d 107-108 (JA59).

VII. ARTICLE 25 EXPRESSLY LEAVES AIRLINES EXPOSED TO LIABILITY FOR WILLFUL WRONGDOING AND MANDATES LOCAL LAW AS THE LAW OF CHOICE FOR WILLFUL AIRLINE TORT.

Of all the provisions of the Convention, Article 25 alone expressly focuses on willful tort.[25] It excludes such misconduct

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25. Article 25:

> (1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. (2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

from the scope of any exclusions or limitations to be found anywhere else in the treaty. It serves an important goal of the Convention to deter carriers from willful misconduct. In furtherance of that purpose, Article 25(1) not only rejects any possibility of Convention exclusivity and preemption of local willful tort law but commands that law's application.[26] Both Article 25(1) and (2) exactly cover the facts and applicable law herein. A "Yes" answer to the *Question Presented* so as to exclude respondent's right to sue in this case is barred by Article 25.

To comb the Warsaw Convention for text supporting an implied airline immunity from willful tort claims for personal injuries is to comb in vain. The opposite is true when searching for exposure to such claims. Article 25 contains a willful tort exception for all liability exclusions, including the exclusion from liability for psychic as distinguished from bodily injuries found in Article 17. It leaves airlines exposed to liability for the same. Willfulness is expressly determinable under choice of law principles ordinarily applied, here the *lex loci delicti*.

The application of state law to liability for damages to passengers for willful wrongdoing committed by the airline in New York State is mandated by the Convention itself. For that was "the law of the court to which the case [was] submitted."

It is uncontested that petitioner's employees who treated with respondent at JFK were doing its work. Petitioner stands in their shoes. Their deliberate deeds were its deliberate deeds. They had carried out the functions and procedures it prescribed for them, rendering it liable when those deeds were tortious. Article 25(2).

It is true that the Second Circuit disagreed with the application of Article 25 to this case of willful tort. While holding that intentionally designed acts are not to be subsumed within the scope

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26. *See* Goldhirsch, *The Warsaw Convention Annotated, a Legal Handbook*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1988, at p. 122.

of the Article 17 "accidents", meaning unexpected, unusual or unforeseen events, the court, comparing Arts. 17 and 25, held that the two were not mutually exclusive and that "Article 25 simply described a subset of 'accidents' that are more egregious and to which a greater degree of culpability attaches." *Tseng*, 122 F.3d 104 (JA52).

Overlooked however was that the two Articles are listed separately and equally. The discrete placement by the drafters of substantive matters into separate equal Articles in the Convention is of dispositive significance for interpretative purposes. *Air France v. Saks*, 470 U.S. 392, 407 (1985) (followed by the Eleventh Circuit in *Krys v. Lufthansa*, *supra*, 119 F.3d 1515, 1522 (1997)).

"The 'accident' requirement of Article 17" (*Saks*) is separately stated and distinct from the "wilful misconduct" provisions of Article 25. Only Article 25 involves *scienter* — willfulness — for an injury producing act. Nowhere in the Convention is it stated that an Article resting on *scienter* is a "subset" of another Article in which the keynote is "accident" — or lack of *scienter*. Just as the Court in *Saks*, at pp. 397 and 398, noted the significance of the difference between "accident" in Article 17 and "occurrence" (in the original French, *"l'événement"*) in Article 18, the same reasoning points up the meaningfulness of difference between Article 17's "accident" and Article 25's "wilful misconduct".

Not only is Article 25's "wilful misconduct" more egregious than Article 17's "accident". "Wilful misconduct" cannot be "accidental", as the Second Circuit pointed out and petitioner has not disputed.[27]

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27. New York law is in accord. *Locke v. North Gateway Restaurant, Inc.*, 233 A.D.2 d 578,579, 649 N.Y.S. 2d 539 (1996). Since by Art. 25(1), willful misconduct is determinable by New York law (being the law of the court to which the case is submitted), and as assault and battery and wrongful arrest are within that category, those torts do not fall within New York's "commonsense" meaning of *accident* (a " 'sudden, fortuitous mischance, unexpected, out of the ordinary, and injurious in impact' " occurrence) (*Matter of Lichtenstein v. Board of Trustees of the Police Pension Fund*, 57 N.Y. 2d 1010, 1012 (1982)).

In interpreting Article 25, and indeed the entire Warsaw Convention, a familiar rule of treaty construction should be honored. *Geofroy v. Riggs*, 133 U.S. 258, 271-2 (1890):

> Even where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred. .

Similarly, *Bacardi Corp of America v. Domenech*, 311 U.S. 150, 163 (1940).

Hence, even if Article 25 were deemed a mere "subset" of Article 17 and Article 17 embodying that subset were deemed to cover Ms. Tseng's lawsuit, the airline's willful wrongdoing would activate the subset's rejection of Convention clauses which exclude and limit rights. It would deny availability to the air carrier of provisions of Article 17 which *exclude* liability for psychic injury and *limit* liability to accidental bodily injuries.[28] An "unnatural reading" of "accident" in Article 17 to include willful wrongs as accidental and preclude recovery because of these exclusions and limitations would create an internal inconsistency within the Convention. It would be "flatly inconsistent" with Article 25 and should not be allowed. *O'Connor v. United States*, 479 U.S. 27, 32 (1986).

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28. Similarly, in New York, damages for psychic injury flowing from such willful torts are recoverable. *Allinger v. City of Utica*, 226 A.D. 2d 1118, 641 N.Y.S. 2d 959 (1996); *Byrd v. New York City Transit Authority*, 172 A.D. 2d 579, 568 N.Y.S. 2d 629 (1991); *Vitale v Hagan*, 132 A.D. 2d 468, 517 N.Y.S. 2d 725 (1987), *mod. other grounds*, 71 N.Y. 2d 955, 528 N.Y.S. 2d 823 (1988) (cited in *Ismail v Cohen*, 899 F.2d 183, 187 (2d Cir. 1990)); *Cooper v. State*, 150 Misc. 2d 635, 569 N.Y.S. 2d 889 (1991).

VIII. THE RECENT ENACTMENT OF *MONTREAL PROTOCOL NO. 4* IS NOT ONLY (A) PROSPECTIVE IN EFFECT ONLY BUT ALSO (B) CONFIRMS THE NONEXCLUSIVITY OF THE WARSAW CONVENTION AS A BAR TO THIS CASE.

(A)

Some five years had passed from the time El Al wrongfully confined, assaulted and battered Ms. Tseng in New York before a sufficient number of Convention signatories agreed to make it — and Article 17 — the exclusive basis upon which a passenger could recover for personal injuries, without making exclusiveness retroactive to willful tort cases which had already accrued.

In New York, a cause of action for personal injuries is property which vests in the victim and devolves to his estate on death. N.Y. Estates, Trusts and Powers Law § 11-3.2; *Lancaster v. 46 NYL Partners*, 228 A.D. 2d 133, 138, 651 N.Y.S.2d 440, 444 (1996). It is frivolous to impart to the just-now sufficiently ratified (June 14, 1998 — (SG #2, 11)) *Montreal Protocol No. 4* the unexpressed retroactive invalidation by treaty of the already accrued New York causes of action, and retroactively deprive plaintiff of her property. *Toop v. Ulysses Land Company*, 237 U.S. 580, 35 S. Ct. 739 (1915). Not even *Amicus* US, extensively discussing *Montreal No. 4*, argues in favor of a retroactive impact on this case. On that issue US limits itself to contending that it would resolve exclusivity "*at least on a prospective basis*", and that

> any doubt about the Convention's exclusivity would be decisively resolved, *at least as to future cases*, by *Montreal Protocol No. 4*, if it is ratified by the United States.

(SG #2, 14).

The concurring opinion of Justice Scalia in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, at 855, 110 S. Ct. 1570 (1990), is apropos:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.

The Court later expressed its agreement in *Landgraf v. USI Film Products*, 511 U.S. 244, 278 (1994).

(B)

The very adoption of Warsaw Convention modifications contained in *Montreal No. 4* by the Convention signatories, if indeed the altered Article 24 is read to preclude state willful tort actions which remain uncovered by the unaltered Article 17 — hardly a necessary result of *Montreal* — would then be further proof that the Article 24 which it changed was limited to accidents and not broad enough to cover all personal injury causes as contended by petitioner. The *Protocol* had been drafted 18 years before the events at the EL AL terminal in New York but was not law governing those events. It was not adopted and made effective for some 23 years. Breadth to cover "any action", not just accidents, was later added and made effective by the June, 1998, adoption of the *Protocol* by and for 30 signatories, not yet if ever including the United States. There would otherwise then have been no reason to adopt the changes effected by the *Protocol* if all personal injury causes, not just those related to accidents, had been covered originally in the eyes of the international signatories.

As petitioner points out in his brief (Pet Br. 38),

> Additional aids to interpretation of the Warsaw Convention may include the post-ratification conduct . . . of the contracting parties to the Convention.

The parties' post-Convention ratification conduct of ratifying *Montreal No. 4* 69 years after the Convention was born in 1929 says worlds of their understanding of the limited effect of Article 24 as it was when the JFK events took place.[29]

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29. The Solicitor General, in addition to Lodging three versions of Montreal (Cont'd)

IX. A FALSE FEAR IS SUBTLY PROMOTED BY PETITIONER IN THE "CONCLUSION" OF ITS BRIEF AND BY PETITIONER'S AMICUS AIR TRANSPORT ASSOCIATION (ATA) THAT THE JUDGMENT BELOW COMPROMISES AIRCRAFT AND PASSENGER SAFETY AND PASSENGER RIGHTS, BUT THE OPPOSITE IS TRUE AND RINGING THAT ALARM IS A DISTRACTING SMOKESCREEN SCARE TACTIC.

A. Aircraft and Passenger Security and DOT regulation, 14 C.F.R. § 129.25.

Though irrelevant to the *Question* on which petitioner sought *certiorari* and on which it was granted[30], petitioner and its ATA *amicus* (though notably not *amicus* US, *see* SG #2, 29, fn. 21) improperly seeks to insert the need for air transport security into the equation. Even if considered, it is meritless.

While petitioner waits for its "Conclusion", without legal references, to becloud the case before this Court with a security scare issue, having omitted it from the body of its brief, its *Amicus* ATA devotes an entire section of its brief to it. (ATABr, Point IV). Referenced most appropriately and unwittingly, but tellingly *against petitioner*, is 14 C.F.R. § 129 as an applicable FAA measure regarding security at airports. (ATABr, 19) The regulation is applicable, but petitioner cannot rely on it for it did not follow it.

14 C.F.R. § 129.25 Airplane security.

(Cont'd)

Protocol No. 4 with the Clerk, has Lodged what purports to be Montreal Protocol No. 3 which has never been ratified by the United States or gone into force anywhere. (SG #2, 12 fn. 7)

30. (Note Sup. Ct. Rule 14(1)(a) limiting review to "the questions set forth in the petition, or fairly included therein" and *Phillips v. Washington Legal Foundation*, __U.S.__ (96-1578, 6/15/98), applying that Rule).

> (*b*) Each foreign air carrier [31] landing or taking off in the United States shall adopt and use a security program, for each scheduled and public charter passenger operation, that meets the requirements of [subparagraphs (1)(2)(3)] [32]
>
> . . . . . [and]
>
> (*g*) Each foreign air carrier conducting an operation for which a security program is required by paragraph (b) (1), (2), or (3) of this section *shall refuse to transport—*
>
> *(1) Any person who does not consent to a search of his or her person in accordance with the security program* . . . (emph. added)

The consent must be to *something*. A person cannot "consent" unless told what she is consenting to. The DOT regulation calls for no less. It calls for the consent to be "to a search of his or her person in accordance with the security program". If EL AL had complied with § 129.25(g) and informed Tseng of her choices — either consent to that *something* — to be confined and subjected to an intimate body search apparently called for by EL AL's security program, or not consent and not fly — there would have been no tort to complain of. The regulation presupposes she be given the right to consent or to withhold her consent to a search in accordance with the security program after being told this airline's routine security program procedures include confinement and manual palpating of the most intimate parts of her anatomy. She was not told and was not given that right. If she had been informed and agreed, no unconsented to confinement and touching, which is to say no false imprisonment and assault and battery, would have

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31. The same security requirements govern domestic air carriers. 14 C.F.R. §§ 121.538, 108.9(b)(1).

32. Petitioner has conceded that this entire Regulation applies.

resulted. If she declined, she would not have been permitted to board but would have been allowed to go home free, unconfined and unviolated.

Petitioner could have protected its flight security according to its own lights by giving Tseng that choice. She was not given it. The record shows respondent was not presented with the § 129.25 voluntary alternatives before she was closed off in the room, denied freedom to leave, and subjected to the offensive intimate body search depicted by the record.

The requirement that foreign airlines comply with 14 C.F.R. § 129.25 explodes the myth that aircraft security would be compromised should the judgment on appeal be affirmed. The DOT regulation protects it thoroughly.

Allowing respondent the option implicit in § 129.25 to consent to be searched or forfeit the flight would not endanger its security or indeed even be relevant to it. An airline is given full control of the security precautions it deems necessary for flight safety. Nor does it even attempt to explain how giving a passenger the choice either to acquiesce to the airline's own security procedures or be kept off the plane would allow security risks to board. By the balanced federal regulations, the passenger's right not to submit to an intimate body search is so protected as to make illusory fears that aircraft safety would be compromised by an affirmance.[33]

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33. The *caveat* in *People v. Kuhn*, 33 N.Y. 2d 203, 210, 351 N.Y.S. 2d 649, 654, 306 N.E. 2d 777, 780 (1973), a criminal case evolving from an airport security check, is noteworthy:

> We do not hold, however, that once the magnetometer is "triggered, indicating the presence of metal upon a person, a further personal search or frisk of the passenger is authorized unless it can be shown that the passenger consents to such search. Failing to consent to a further search at this point would, of course, bar him from boarding the plane. Since the sole purpose of the airport security measures

(Cont'd)

Affirmance could have no effect whatsoever on international airline security as frighteningly projected by ATA's *amicus* brief. (ATABr., 20).

B. Passenger Rights

A bogus threat to passengers' rights against airlines is scaringly forecast by ATA if the Court affirms. (ATABr, 17). Assuming the unlikely posture and garb of zealous advocate of passengers' rights against its members, it speculates that an affirmance would deprive American citizens traveling abroad of the benefits of the Convention and expose them to the vagaries of local foreign law.

They are already exposed. However great its persuasiveness, this Court's mandate does not bind those foreign realms. If effect there be, an affirmance would likely encourage foreign courts not already so inclined to allow claims for willful airline tort to be pursued by victimized passengers under local law outside Article 17 which does not cover them. Far from encroaching on other passenger rights under the Convention, an affirmance will leave them intact.

(Cont'd)

is to prevent air piracy, there is no need to further search such a prospective passenger as he will not be permitted to board the plane and no longer represents a threat as a potential hijacker.

CONCLUSION

For the reasons stated above, the judgment should be affirmed.

Respectfully submitted,

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